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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1929

No. 363

GEORGIA POWER COMPANY, *Petitioner*

vs

CITY OF DECATUR

Writ of Certiorari to Supreme Court of Georgia

BRIEF FOR RESPONDENT

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STATEMENT OF THE CASE

We think it will facilitate an understanding of the issues, if, in addition to the usual narrative of facts, we call attention in this statement to such legislative acts and judicial decisions as constitute part of the history of the controversy or serve to furnish reasons for things done. While this may make the initial statement a little longer than usual, it will save the Court some labor, and reduce the need for argument.

The Collins Park & Belt Railroad Company which, for convenience, will be referred to herein as the Collins Park Co., was, as stated by the petitioner for certiorari, chartered in 1889 by special act of the Georgia Legislature printed in the transcript on page 1. At that time the Constitution of Georgia contained the following provision, (*Code of 1882* Sec. 5077).

> "The General Assembly shall have no power to grant corporate powers and privileges to private companies except banking, insurance, railroad, navigation, canal, express, and telephone companies," * * * * *

It is also true that in 1889 the Code of Georgia contained a provision, which is still of force and to be found in Section 2215 of the present Code, as follows:

> "Should any charter granted in future by the General Assembly, to a private corporation be silent as to its continuance, such charter shall expire at the end of thirty years from the date of its grant."

If, therefore, the charter of the company was never extended, (a point on which the record in this case is entirely silent), it must be conceded to be true, as claimed by the petitioner for certiorari, that the Collins Park Company automatically ceased to exist as a corporation August 16, 1919.

In 1891 the Constitution of Georgia was amended by striking out the exceptions stated in the clause quoted and requiring all such corporate powers to be conferred under general laws, and through the office of the Secretary of State. It so appears in the subsequent Code of 1895, Sec. 5780, and in the current Code of 1910, Sec. 6446.

Appropriate legislation for carrying this amendment into effect was enacted in 1892, as will appear from the Georgia Acts of 1892, page 37, reproduced in the Code of 1920, Sec. 2577, *et sq*. There have been several amendments to this act, one of which extended all its provisions to street railroads, (*Georgia Laws* 1894, p. 69; *Code of 1910*, Sec. 2600).

Among the provisions of the act of 1892 pertinent to this case, it may be noted that by Section 8 of the act, (*Code Sec.* 2584), corporations thus created are

limited in duration to one hundred and one years, unless renewed at the expiration of that time.

It will also be noted that by Section 17 of the Law of 1892, (*Code Sec.* 2596), any railroad previously incorporated under special act, (such as the Collins Park Co.) may at any time, under the terms and machinery of the Act of 1892, amend its charter either by adopting the provisions of the act, or by extending the time for the expiration of its charter for a period of fifty years.

> Note—As the record does not inform us whether the Collins Park Co ever did or did not avail itself of this privilege to extend its life, and since there was no pleading or issue at the trial that would have made it needful, or even proper, for the City to have offered evidence on that subject, we submit to this Court whether, where a party is here asking a judgment predicated on the theory not advanced in the trial court, that the charter expired in 1919, it is not a necessary assumption that the company did so amend its charter and is still legally in existence. What premise shall be assumed on that subject we leave for the court to adopt *ex mero motu*.

By Section 18 of the law of 1892 above referred to, (*Code of Georgia of 1910*, Sec. 2597), authority for the sale or purchase of the property of a corporation of either class by one of the other was conferred as follows:

> "Any railroad company incorporated under the provisions of this Article shall have authority to sell, lease, assign, or transfer its stock, property, and franchises to, or to consolidate the same with, those of any other railroad company incorporated under the laws of this or any other State or of the United States, whose railroad within or without

this State shall connect with or form a continuous line with the railroad of the company incorporated under this law, upon such terms as may be agreed upon; and conversely any such corporation organized under the provisions of this Article may purchase, lease, consolidate with, absorb, and merge into itself the stock, property, and franchises of any other railroad company incorporated under the laws of this or any other State of the United States, whose railroad within or without this State shall connect with or form a continuous line or system with the railroad of such company incorporated under this law, upon such terms as may be agreed upon. And it shall be lawful for any railroad company or corporation now or hereafter formed by the consolidation of one or more railroad companies, or corporations, organized under the laws of this State; or under the laws of this State and any other States, with one or more companies or corporations organized under the laws of any other State, or under the laws of this and other states, to issue its bonds and stock as provided for in this Article, in such amounts as they may deem necessary for the purpose of paying or exchanging the same for or retiring any bonds or stocks theretofore issued by either of the said companies, or corporations, so merged, purchased, or consolidated, or for any other purpose, and to the amount authorized by the laws of the State under which either of said companies, or corporations, so consolidated, was organized, and to secure the same, in case of bonds, by mortgages or trust deeds upon its real or personal property, franchises, rights, and privileges, whether within or without this State.

Pursuant to the authority of the Act of 1892, and expressly referring thereto, divers persons applied in January 1902 to be incorporated as the Georgia Rail-

way & Electric Company, for the full period of one hundred and one years, with power "to purchase and own existing lines or to construct their own lines" in certain designated streets and towns, for "a railroad" that was in terms to be "about 140 miles as near as can be estimated," including as part thereof, by description, the identical line now considered, (*transcript pp. 8 to 11*,) the application containing the following recital: (*p. 9.*)

> "The purpose being to purchase and acquire, or build and construct, and maintain and operate, a complete system of street and suburban railroads for the purpose of transporting persons and property in the cities and town of Atlanta, Decatur," etc.

The certificate of incorporation, issued January 28, 1902, referred to the petition as being "for the purchasing, owning, constructing, equipping, maintaining and operating *a street and surburban railroad*," etc., (italics ours,) (*transcript p. 12*,) and declared the petition granted and the company incorporated for the purposes stated, and for one hundred and one years. (*p. 12.*)

In 1900 the Collins Park Co. had obtained an amendment to its charter, under the terms of the act of 1892, changing its name to Atlanta Rapid Transit Company, (*p. 6*), and, in March 1902, under that name, conveyed to the new company, (Ga. Rwy. & E. Co.,) "all of its property, together with its different lines of railway," (*transcript pp. 13 and 51*). Which included the line in question, and which line thereby became part of the "*system*," or "*railroad*," which the purchaser had by the terms of its charter been incor-

porated to create through the purchase of old separate lines and the construction of new ones.

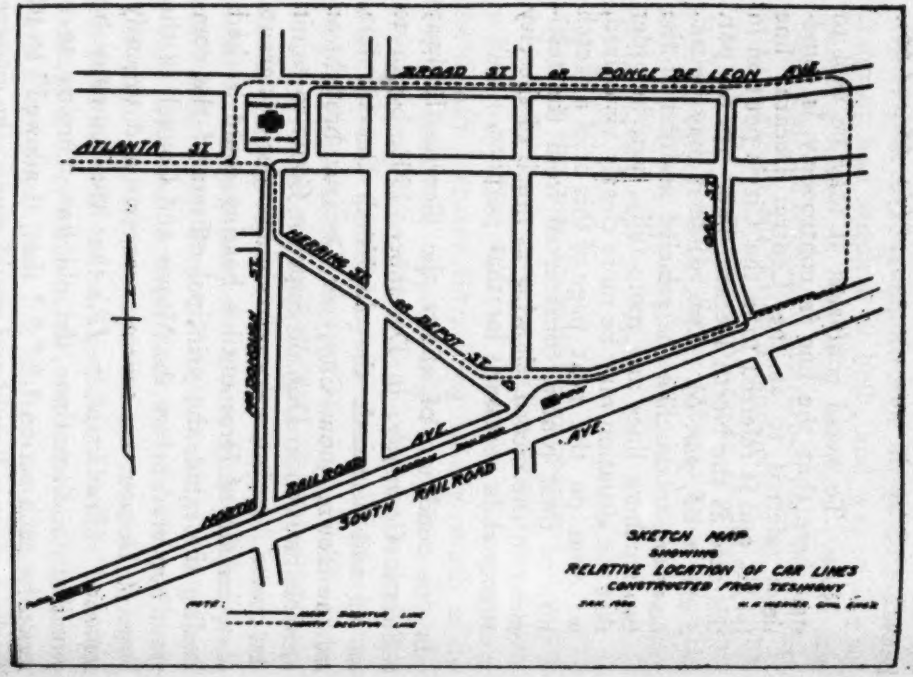
After March 1902 the Georgia Railway & Electric Company had acquired or built, and was owning and operating under its charter a complete system, composed of all the street and interurban lines in or around Atlanta except the Atlanta Northern, a line running from Atlanta northwest to Marietta, of which it owned all the stock, and the Stone Mountain line from Decatur to Stone Mountain which had not then been built. (*Transcript p. 51*).

Among the lines so owned and operated as part of the system were three interurban lines from Atlanta to Decatur. The oldest of these was and is known as the South Decatur line, lying wholly south of the Georgia Railroad. (*pp. 49 and 54*). The next oldest was generally referred to as the North Decatur line, originally built in 1892 by the Atlanta Railway Company. This was the line that was afterwards discontinued. It entered Decatur from the west but some distance north of the Georgia Railroad, ran along Atlanta Avenue, past the Court House Square, and eastwardly down Depot Street, making a loop about a mile long and coming back by the Court Square. The third and newest was the line now in question, generally referred to as The Main Decatur line, constructed a short while before, ostensibly by the Collins Park Company. This line started near the center of Atlanta, ran through the territory formerly included in the towns of Edgewood and Kirkwood, both of which have since been abolished and incorporated in Atlanta, and through certain rural territory of DeKalb County now included in Decatur, entering Decatur from the West along Railroad Avenue, in-

mediately north of the Georgia Railroad, making a loop of about a mile and coming back by the Court House Square (*Transcript pp. 49, 51, 53, 54, 65, and 83,*) By December, 1902 all three of these lines had been acquired by the new company. (*pp. 65 and 66*).

Note. To avoid confusion it may be well to state here that the line in controversy is sometimes referred to as the Central Decatur line (p. 51), and is referred to in the City's petition in this case as the North Decatur line. (p. 64, par. *5 and p. 65, par. 6*). Also, while it may be unnecessary to describe the relative position of the two northern lines any more fully, yet, in order that the situation may be more clearly visualized, we print on the next page of this brief a sketch map of their routes, constructed from the testimony in the record, showing as much of the city streets as is necessary for that purpose.

In this condition of affairs the Georgia Railway & Electric Company, in December, 1902, began to tear up and dismantle the old North Decatur line, and the Town, (now City,) of Decatur brought an equitable petition in DeKalb Superior Court to enjoin that course. A temporary restraining order was granted, to remain of force until a hearing could be had. Pending the same, the principal officers of the company "appeared before the Mayor and Council of the Town of Decatur on several occasions and urgently requested" (*Transcript, p. 13,*) that the company be permitted to discontinue the old line, "urging as a reason for such action * * * * * that, if allowed" so to do, the company, "could and would give to the citizens of the Town of Decatur better street car facilities upon another parallel line" etc. (*Ib*).


BROAD ST
PONCE DE LEON AVE
ATLANTA ST
GERRARD ST
OAK ST
AVE
AVE.
SOUTH RAILROAD
SKETCH MAP
SHOWING
RELATIVE LOCATION OF CAR LINES
CONSTRUCTED FROM TESHAWAY

With grave doubt and hesitation, and some distrust manifest from the documents, the town government finally yielded to these importunities, and an agreement of accord and satisfaction was reached, under which the old line was discontinued and torn up to a point half way between Atlanta and Decatur, about three and a half miles to the west. The documents constituting the contract are fully set out in the transcript, beginning on page 13, and show the utmost care and deliberation on both sides, the City insisting on the most meticulous evidence of consent and an affirmative covenant on the part of the company to do and perform. How far the city may have been warranted in its apprehensions and suspicions is not a question here necessary to be discussed, but, as the whole complexion of the company's case indicates a desire to put the city in the light of oppressor, we invoke a careful consideration of the documents. Both sides thereafter acted under and observed the terms of the agreement without question until Oct. 5, 1920, a date which should be borne in mind as having an important bearing on some of the legal questions involved in the present litigation.

In October, 1911, divers persons applied to the Secretary of State under the provisions of the Act of 1892 to be incorporated for 101 years as a "suburban, interurban and street railroad company" to be known as The Georgia Railway & Power Co. (*Transcript p. 20.*) The application set up *inter alia* that "the length of the said road" would be about two hundred miles. The lines described as composing this two hundred miles included the Main Decatur line and the South Decatur line and the application indicated a purpose, as such proposed corporation to "construct and build,

or purchase lease and acquire" such lines, asked specific power so to do, and contained the recital, (*page 23*),

> "The purpose being to purchase, lease, acquire, build, construct, own, hold, maintain and operate *a complete system*, (italics ours), of street suburban and interburban railroads," etc.

and further indicated a purpose to

> "connect the said various towns and cities and various points in said cities and towns with each other, and with such other points within or without the said cities and towns" etc.

Certificate of incorporation was made as prayed, and the Georgia Railway & Power Co. came into existence for one hundred and one years, the internal evidence indicating unmistakable practical identity of the two corporations, though separate nominal corporate existence.

On January 1, 1912 the Georgia Railway & Electric Company leased all its properties to the Georgia Railway & Power Co. for 999 years. Parts of the lease contract appear in the record, enough to indicate as follows:

That the lessor owned and was operating "an electric railroad" in and about Atlanta (*p. 28*) upon which it had placed a twenty million dollar mortgage, besides all the capital stock of certain other utility corporations including The Atlanta Northern Railway; that the lessee had been organized as a corporation under the laws of Georgia for the purpose of such owning and operation and with power to take over the property (*p. 29*). Whereupon it demised and leased, etc.

The lessor covenanted to maintain its corporate existence, renew the same from time to time, and deliver possession, etc. and the lessee to pay divers charges, including interest on the bonds, sinking fund, taxes, etc, accept the property in its then condition, and that, "subject to the provisions of existing and future municipal grants," it will maintain, etc. (*p. 33*). It also assumes all the contracts and other obligations of the lessor, (*p. 35*,) and agrees that it will operate the properties in accordance with the laws of Georgia, (*p. 35*). In Section 26, (*p. 36*,) it covenants to perform all the obligations of the lessor imposed by any law or municipal contract.

In 1907 the General Assembly had enlarged the powers of the Railroad Commission, (now called the Public Service Commission,) by extending their rate fixing authority to street cars, but adding this proviso, which is still or force, and to be found in Section 2662 of the Code:

> "Provided, however, that nothing herein shall be construed to impair any valid subsisting contract now in existence between any municipality and any such company; and provided that this section shall not operate as a repeal of any existing municipal ordinance."

In view of certain strained deductions petitioner seeks to draw from this proviso, it may be here properly mentioned that it limited the authority of the Board only as expressed; i. e., by forbidding it to impair any contract. In other respects companies having such contracts were subject to the authority of the board just exactly like others. In the case of this company the authority of the Board can not alter fares or permit it to abandon its line. As to all other matters it is

subject to the control of the board in the same way as other parts of the "system."

In 1918 the lessee company applied to the Railroad Commission for an increase in rates on the lines operated by it, the increase affecting four municipalities, each of which claimed contractual obligations on the subject, one of these being Decatur. The Commission held that under the law above quoted it had no jurisdiction. The lessee thereupon applied for a mandamus which was denied. The case went to the Supreme Court and is reported in 149 Georgia, page 1. The Supreme Court held, in so far as Decatur was concerned, that the contract of April 1, 1903 is a "valid subsisting contract," (*p. 11 of the report,*) and in 1919 affirmed the judgment to that extent.

In several parts of the brief filed by petitioner for certiorari, reference is made to an alleged order of the Georgia Public Service Commission as holding that the rate agreed on is confiscatory. We have never considered this relevant, or deemed it necessary to enter into any discussion of this action of the Commission, for the reason that it was wholly without jurisdiction on the subject, and its order in question not only purely *ex parte*, without any notice to or hearing from the Town of Decatur, but also because what it said was a void utterance amounting to no more than street gossip. In addition to these infirmities, however, the additional fact remains, to which we should perhaps, at this point, direct the court's attention, that the order in question did not find or declare, as so often inaccurately stated in the brief and pleadings of the petitioner, that the rate was confiscatory. What it did say was that the rate as fixed by the contract was not fairly compensatory. Even

this statement we would deny by evidence in any case where it was a relevant issue. It did not even disclose what data or what considerations the commission fancied should enter into any conclusion as to what is necessary to make a rate or the return therefrom "fairly compensatory."

On October 5, 1920, a date referred to on page 9 *supra* as important, the Georgia Railway & Power Company, (the lessee,) notified the mayor and council of Decatur that on and after the 20th of that month it would charge a fare of seven cents on the main Decatur line, and that it denied the legality and validity of the contract of 1903, alleging also that if the contract was ever valid it had ceased to be so, but not explaining why. (*See Transcript, page 71.*) The Town sought an injunction in DeKalb Superior Court in case No. 2497 (*ib*) setting up therein the facts already herein detailed.

An interlocutory restraining order having been granted, the case went to the Supreme Court of Georgia where the ruling was affirmed, as will appear by reference to *Georgia Rwy. & Power Co. vs. Decatur*, 152 Ga., 143.

Afterwards, the case having come on for a final hearing, and the injunction being made permanent, it went again to the Supreme Court of Georgia where it was again affirmed in 153 Ga., 329, the court declaring (p. 331,) that every possible question had been settled in the mandamus case and in the case arising on the temporary injunction.

The matter was then brought to this court on writ of error and the judgment affirmed, (at least so far as

concerns the questions now at issue,) in June, 1923, in the case of *Georgia Ryw. & Power Co. vs. Decatur*, 262 U. S., 432.

In 1925 the City of Decatur, successor to the Town of Decatur, adopted an ordinance for the paving of certain streets which would entail some expense on the company, and against which, in July of that year it protested in certain correspondence shown on pages 39 to 41 of the transcript. This correspondence is without legal significance, and seems to have been intended to make a case for anticipated litigation by including somewhat exaggerated and inaccurate statements as to the expense. No evidence was offered in support of these assertions except the fact that afterwards, the City was undertaking to collect some $14,000.00 for the Company's proportion of the cost. (*Transcript p. 52*).

In September the lessor and lessee companies offered to the City government to surrender the "permits and franchises" granted by the City for construction and operation of the Main Decatur line. The documents constituting the proposal to surrender appear on pages 42 to 47 of the Transcript, but are too long to set out here. For the present we direct attention to the fact, which may or may not be relevant and important, that the offer not only did not contemplate an abandonment of any part of the line west of Decatur, but manifestly did not contemplete surrender of any part of it even inside the City, except that part lying east of the old town limit at Patillo Station and in the five cent zone. The words "from the western town limits" occurring in the document, (*page 43,*) evidently refer to the town limits as they existed in

1899. The significance of this fact will be appreciated and understood if reference is had to that part of the opinion of this court in the case of *The Georgia Railway & Power Co. vs. Town of Decatur*, 262 U. S., page 432, which occurs on pages 439 and 440 of the opinion, and concerns certain rural territory annexed to the town west of Pattillo Station after the contract was made.

Simultaneously with this offer the president of the lessee company advised the city that on September 20th (30th?) it would discontinue the operation of tne line in Decatur. (*page 42*).

Thereupon, on Sept. 28, the City declined to accept the surrender, (*p. 48*,) and on the 29th, filed its equitable petition to enjoin the threatened course. This petition is set out in the transcript, page 63 *et sq*. It sets up the facts substantially as hereinbefore narrated and makes certain particular issues and allegations that may be here specially mentioned, as follows:

It alleges that one of the lines of the defendant's system is the North Decatur line, meaning thereby the line in question herein referred to as the Main Decatur line, (*see also par. 13, p. 69*,) running from an indicated point in Atlanta and into the City of Decatur, a total distance of six and a half miles, including the loop; (*par. 5, page 64*,) that the length of the line in Decatur is about two miles, on one half of which a five cent fare is collected; (*par. 6, page 65*,) that the Town of Decatur had fully and at all times performed its part of the contract of April 1, 1903, to the detriment and inconvenience of the citizens; (*par. 16, p. 69*;) that the lessor and lessee companies had for many years enjoyed the benefit thereof; (*ib*) that for twenty-two years the two companies had

operated in accordance with its terms; (*par. 17, p. 70;*) that the lessor company had built the double track as provided in the contract and as permitted thereby; (*ib*) that since its construction the two companies have operated the line as part of a single system and never as a separate or single line; (*paragraph 20 and 21, pp. 71 and 72,*) and that when the charter of the Town of Decatur was amended in 1922 and the Town denominated a city, it was expressly provided by the General Assembly that the valid and susbisting contracts of the town with any corporation should inure to the benefit of the City and that the City should assume the obligations thereof. (*par. 22, p. 72*).

The petition further alleged that there is no law authorising the defendants to surrender their franchises, and no order of any function of government authorising them to cease the operation of cars on said line or any part thereof. (*par. 26, p. 73.*) It also specially pleaded and set up that the right of the defendants so to surrender or cease operation under the contract of April 1, 1903, was determined and adjudicated in the cases already herein referred to in the Supreme Court of Georgia and in this court, and that the issues involved are *res adjudicata*, not only by reason of these matters but by the final decree of DeKalb Superior Court itself in said case No. 2497.

The defendant's answer involved a somewhat sweeping denial of nearly all the material allegations of the petition. In view of the present state of the record it is not important to comment on these denials, since the agreed statement practically nullifies the denials. We think the evidence sustains the allegations of the petition.

Examination of the answer will show that we are warranted in saying that it contained no hint or suggestion of any claim to the effect that the contract of April 1, 1903, was either expressly or by implication limited in its duration to the lifetime of the Collins Park Corporation. Neither did it suggest any claim that the contract was in any other way limited in time.

Aside from its sweeping and general denials of the allegations in the petition only two special matters of defense were set up, as follows

1. One of these, contained principally in paragraphs 10 to 16 of the answer, (*p. 80-83*), was apparently an attempt to show that the line in question was not part of a system but separate property.

2. The other was a defense set up, (*par. 17-19, p. 85-88*), to the effect that the Legislature of 1919 had empowered Decatur to do certain street paving and assess part of the expense thereof against property owners benefitted thereby; that the City had done such paving and was charging a large amount to the Company. Alleging that the act in question was unconstitutional and void, it prayed an injunction against the enforcement of the charge. (*p. 88*) By an amendment filed in April, 1926, the allegations touching the injustice and invalidity of the paving charge were elaborated, but no amendment was made to the prayer that the act be held unconstitutional and its enforcement enjoined. (*pp. 89-95*).

In July, 1928, the fact was suggested of record by attorneys for the Company that, pending the litigation, the lessor and lessee corporations had been merged and consolidated as the Georgia Power Company and motion was granted to substitute this concern

as defendant. (*p. 96*).

In 1928 the case came on for a hearing in DeKalb Superior Court, the presiding judge sitting by agreement as judge and jury to pass on all questions of law and fact. (*p. 1*).

The decree made no separate finding of fact, but enjoined the company as prayed. (*p. 61.*) The decree was also silent as to the paving matter. It was dated Sept. 15, 1928.

Within due time the Company sued out its writ of error to carry the matter before the Supreme Court of Georgia, the assignments of error (*Transcript pp. 61 and 62,*) being as follows:

> "That the said decree was erroneous and contrary to law and contrary to the evidence in said case and without evidence to support it, and that said Judge erred in not denying the relief prayed for by the plaintiff in said case, and erred in granting the injunction prayed for therein and enjoining the defendant as prayed and set out in said petition.
>
> "That said court in not granting it the relief prayed for in its answer and cross-bill and its answer and cross bill as amended erred and excepts to the refusal of said court to grant each and every one of the prayers and the relief asked for by said defendant * * * * * in its answer and cross bill as amended and assigns error thereon and says that the court erred in refusing to grant it each and every one of the grounds of relief prayed for and set out in its said answer and cross bill."

ARGUMENT AND BRIEF

FIRST PART—THE CITY'S CASE

I. *A Simple Matter of Private Contract Involving no Federal Question.*

II. *Questions Relating to the Paving Matter.*

THE AFFIRMATIVE CASE FOR THE CITY

I. A Simple Matter of Private Contract. Involving No Federal Question

The case for the City is unusually simple. By express contract in writing which both parties had authority to make, the Company covenanted upon adequate consideration, that it would double track the line in question "from terminus to terminus," maintain and operate the same in safe and comfortable condition, "grant one transfer ticket upon the payment of one full fare, * * * from any point within the Town of Decatur on said line, * * * * to any point within the City of Atlanta on any of its lines in said city, and vice versa, * * * * and that it would never charge more than five cents for one fare * * * * * for one passenger * * * * * from the terminus of said line in the City of Atlanta to the terminus of the same in the town of Decatur," * * * * * and vice versa.

In previous litigation it has been definitely and finally ruled that this contract was within the corporate power of the City of make; (*Ga. Rwy. and Power Co. vs. Railroad Commission of Georgia*,) 149 Ga., 1, pp. 5, 6, and 7.); that it was a "valid and subsisting" contract in 1907, and was still subsisting in 1919, (*ib* p. 11.); that it was still a valid and subsisting contract after the 5th day of October, 1920, (*Ga. Rwy. & Power Co. vs. Town of Decatur, 152 Ga., 143,*); that the last named case was *res judicata* of the entire subject and had settled every question between the parties, (*Ga. Rwy. & Power Co. vs. Town of Decatur*, 153 Ga., 329,); and that, since the rate and service in controversy was matter of contract, the prohibitions of the 14th Amendment are not involved. (*Ga. Rwy. & Power Co. vs. Decatur*, 262 U. S., 432).

In the report of the case as shown in the Transcript, page 97, *et sq.* (see also 168 Ga., 705), the two paragraphs marked 1 and 2 are really the decision. These "head notes" are written by the court in Georgia and not by the reporter, this being the requirement of Code Section 6202 where they are referred to as "a synopsis of the points decided." By Code Section 6130 it is provided that the judges may direct the reporter to omit entirely a full report where the points decided may be clearly understood from the head notes or synopsis, and many cases are so published by head notes only.

Of course we are not here questioning the importance of the opinion; we rely on it; but, in order that this court may know exactly what was decided, we are explaining the principles stated.

In addition to what is so ruled in the head notes, the opinion observes, in substance, that the terms of the contract show it to have been intended as a permanent operating contract; that to permit the company to tear up its track would destroy the contract; that towns have nothing in the nature of a franchise to give, except their consent to what the state has given; that if the contract did not expressly give that consent to this company or its predecessor it did so by necessary implication; that the court is not concerned with the question of any franchise or consent, but with a "specific" contract; and that the line in controversy is part of a great street railway system which the company can not, under the authorities, abandon.

Except for the allegations made in the original answer, in paragraph 17 to 19 inclusive, (*Transcript pp.*

85 to 88,) and in the amended answer, paragraphs 20 to 25 inclusive, (*pp. 89 to 95*,) which matters relate to a certain paving assessment, and are presented expressly as a "cross bill," the defenses presented consist only in a general denial and a claim that, for reasons given, the line is not part of a system so as to be within the rule laid down in *Fort Smith Light & Traction Co. vs. Bourland, et al.*, reported in 267 U. S., 330, and other such cases.

> Note—Attention is here called to the fact that, in what is said by the Georgia Court on page 100 of the printed transcript, in reference to a defense contained in paragraph 37 of the answer the court is not speaking of the answer in this case, but of the answer in a former case, between the same parties in 1920. If this court desires to examine that record, as the Georgia Court did, it will be found at page 228 of the printed transcript in No. 463, October Term, 1922, (29,013.)

The matter of the paving assessment is not presented as a direct defense to the City's suit, or as constituting any reason why the city's petition is, in itself, unwarranted, but as the basis for praying independent relief by way of injunction against the assessment, on the suggestion that it depends on an unconstitutional law. We will reply later to this matter. For the present we submit that, outside of the cross bill on the pavement matter, the defense raises no federal question whatever.

We have candidly sought to find such a question, and we can find nothing in the case that differs from any other case in which one party to a private contract threatens to abandon, and the court enjoins him from so doing.

Counsel for petitioner are at pains to demonstrate that, where a federal right is at stake and a contract is set up, either to aid or defeat the assertion of such a right, this court is not bound by the interpretation of the state courts either as to the existence, the meaning, or the duration of the contract, but will determine these matters for itself. Counsel might have spared themselves that labor. The writer of this brief would distrust the soundness of his own reasoning faculties if he even needed authority to tell him that, where a federal right or duty is involved, this court not only may, but must, determine that question for itself. Any other view would involve an abdication of its duty by this court.

But what federal right is involved? Not any impairment of a contractual obligation, for the constitutional provision on that subject relates only to impairment by legislative action. Moreover the City is not assailing but defending the contractual obligation, and nobody, not even the defendant company itself, denies it.

Certainly it is not the deprivation of property without due process, for that inhibition relates only to deprivation by official action, and no branch of the state government has touched the subject except the courts, and the courts have acted only after notice and hearing. These things *are* due process.

It may be that we are mistaken, but it is not our understanding that either the 5th or the 14th Amendment guarantees against judicial error. They only insure against arbitrary action that denies a legal hearing, and guarantee an honest judicial effort to decide a controversy. If the prohibitions referred to go further

than that, it results that any alleged error in construing any private contract or deciding any other private dispute, opens tne door of this court to an appeal by the losing party.

Possibly, if a state court should whimsically depart in a given case from some long established line of decision that had become a rule or property, or should corruptly so construe a contract as to destroy vested rights, some question of due process might arise; and certainly a decision by a state court would be open to review here for mere error, where the question before the court was as to whether some previous legislative or administrative action violated due process. But we can see nothing to warrant a federal inquiry as to whether a state court decided right or wrong in passing on the meaning or effect of a private contract or the fact of a private tort. If the Power Company was deprived of any property or property right, it was not done without "due process of law."

But suppose it *is* within the province of this court to review the conclusions of the Georgia Court; has not that been done already? In respect of this very contract this Court said in the case cited from 262 U. S.,

> "The contract being valid, we are not concerned with the question of whether the rates are confiscatory."

Counsel for the company are evidently confused in their appraisement of the value of certain cases in which there were either no contracts at all, or merely obligations or immunities arising by operation of law. In addition to the previous ruling of this court in this

case, above quoted, there are any number of cases in which it has been held in express language, or by necessary implication, that public utility concerns are bound by their covenants just exactly as any other person is bound. We suppose there is no case anywhere to the contrary. It would be a work of supererogation to pile up a great multitude of authority. The principle is elementary.

Thus the case of *Franklin Telegraph Co. vs. Harrison*, 145 U. S., 459, was not only an effort by a public utility concern to avoid its contract, but was one, in many respects singularly like the case at bar, and the reasoning of this court was so curiously applicable here, that by the change of a score or so or words, the opinion would fit this case. We quote as follows:

> "Why shall not the telegraph company perform the terms of its contract? Its original execution was unattended by fraud, surprise, misrepresentation, imposition, concealment of material facts, or mistake. The parties thoroughly understood the situation and knew what they were doing. The possibility that, by reason of an increase in the population and business of New York and Philadelphia, the use of a telegraphic wire between those cities could, in time, be sold for more than $600 per annum was, of course, present to the minds of those who were interested in the telegraph company, and to whom were entrusted the negotiations for the relinquishment of the contract Harrison Bros. & Co. had with the Insulated Lines Telegraph Company. Nevertheless, the telegraph company deliberately chose to risk that possibility in order to get the Harrison contract out of its way. That contract having been relinquished, and a large sum, exceeding $10,000, having been advanced by Harrison Bros. & Co. to erect the wire, the telegraph company

ought not to be heard to urge, as a ground for not performing its agreement, that the annual license fee stipulated to be paid by appellees is much less than could be now obtained from others. If competing telegraph lines had been established between New York and Philadelphia, and by reason thereof such use as appellees and their licensees make of the wire in question could now be had for much less than $600 per annum, that cirstance would hardly constitute sufficient ground for them to refuse payment of the full amount stipulated to be paid for its use annually. A different rule should not be applied where the price has increased, because of the absence of competition among telegraph companies, or from other causes not attributable to the plaintiffs."

So in *Detroit vs. Detroit Citizens St. Rwy. Co.*, 184 U. S., 368, there was a contract presenting even more striking points of similarity to the case at bar. True the situation was reversed there, and it was the city that was seeking to depart from the contract. It hardly needs argument to show that, if the contract was binding on the city, it was equally binding on the company. If authority is needed on that subject, it was said in the opinion in that case, (page 387,) that

"the language used amounted to an agreement upon the subject matter which could not be altered during its continuance by either party."

Another case presenting many points of similarity to this, was *Columbus Railway P. & L. Co. vs. Columbus et al*, 249 U. S., 399. In that case it was said on page 409,

"By these contracts, obligatory alike upon the city and the company, the city granted the right to use the streets and the company bound itself

to furnish the contemplated service at the rates of fare fixed in the ordinances. We cannot agree with the contention of the appellant that these were permissive franchises, granted and accepted with the right upon the part of the company to abandon the uses and purposes for which the franchises were granted because the rates fixed became unremunerative, as alleged in the amended bill. The authority under which the city acted came from the state, and was granted by proper statutes passed for that purpose. The contracts were made between the city and the company, and became mutually binding for the period named in the ordinances."

In Southern Iowa Electric Co. vs. Chariton, 255 U. S., 542, the decision was against the city, but upon the express ground that, under the declared policies of Iowa, cities had no power to make such contracts. On the abstract principle involved, this court said,

"Where, however, the public service corporations and the governmental agencies dealing with them have power to contract as to rates, and exert that power by fixing by contract rates to govern during a particular time, the enforcement of such rates is controlled by the obligation resulting from the contract, and therefore the question of whether such rates are confiscatory becomes immaterial."

While these cited cases rule exactly the principle we are contending for, as matter of substantive law, it should not be assumed that they imply the existence of any federal question in the matter. All four of these cases came up from federal trial courts. In the *Chariton* case there was a resultant federal question. It was conceded that if the contract was void, the effort to reduce rates would violate the 14th amendment;

but, if the contract was valid, there was no such question. Whether the contract was good or not, was to be and was determined by examining what the Iowa Court held on that subject. If this court had held to a different view as to the meaning or validity of the contract, it would conceivably have raised a most delicate and difficult question. Apparently this court accepted the opinion of the Iowa court as to the authority of the City to make such a contract.

And this, we submit, is the true rule; that, in cases where, if there was no contract, the thing complained of would violate a federal right, this court will determine for itself as to the existence, meaning and effect of the alleged contract; but will be bound by the judgment of the state court as to the legal authority of the corporation to make it.

Fortunately for us, it is not necessary to argue these questions. We have not the faintest objection to this court's construing both the authority of the city to make the contract and its significance when made. We have presented our views on these subjects in the sole purpose to discharge the full duty resting upon counsellors of the court.

II. The Question of the Paving Assessment

Respondent is in doubt whether it is necessary to discuss this question at all. Unlike some of the issues presented in petitioner's brief, it was made by the pleadings, and there was an adequate assignment of error on it in the Supreme Court of Georgia. On the other hand, there seems to be no assignment of error on it in this court, and it is ignored in the brief filed for the petitioner. It seems to be abandoned here.

But it does raise a federal question, and, it is the only thing in the record that does make such a question. It seems to have been entirely ignored in the decision, as well as in the opinion of the Supreme Court of Georgia.

In the uncertainty by which we are embarrassed in these circumstances, desiring neither to vex the court with needless argument, nor neglect an issue, we discuss the question in an appendix to the brief, so that if, for any reason, it is thought necessary to consider it, the court can do so; while, if it is deemed unneccessary, the court can ignore it as the Supreme Court of Georgia did, and as the petition for certiorari has done here.

SECOND PART—CERTAIN PRELIMINARY AND EXPLANATORY MATTER

I. The Assignments of Error

II. The City's Relation to the Franchise

CERTAIN PRELIMINARY QUESTIONS

I. The Assignments of Error

There are presented in petitioner's brief certain special contentions that were not considered or passed on by the Supreme Court of Georgia at all, such as the alleged termination of the Collins Park Charter and the consequences thereof; the matter of the duration of the contract, and the necessity and sufficiency of the offer to surrender the franchise. While we are entirely willing to discuss these questions on their merits, and would, indeed, prefer to do so, we do not think they are in the case. If there was any error committed in respect of them in the trial court, it would be unjust to the Supreme Court of Georgia to ascribe error to it, because, under the law, it had no jurisdiction to consider these matters.

Candor requires that we advise the court why we think the Georgia Court, whose decision is under review, could not have considered these matters. This makes it necessary that we explain the appellate jurisdiction and practice in Georgia; but, as this Court may not, and probably will not deem it necessary to consider the matter at all, we collect the authorities on the subject in an appendix, merely summarizing the principles here, but promising that the appendix will fully support the statements now to be made.

1. By the Constitution the Supreme Court is expressly denied any original jurisdiction and declared to be restricted to the correction of errors.

2. In this Court the assignments of error are merely

the *ex parte* declarations of the plaintiff in error as to the legal propositions he intends to advance; and, while no other errors, will generally be considered, the court reserves the right to consider a plain error even though not assigned. In Georgia there is a valid statute forbidding the court to decide any question that is not made by "a special assignment in the bill of exceptions."

3. There is a reason for this. The certificate of the trial judge is declared to be "the writ of error," and the assignments must be set out in the bill. Being so certified the statute directs that the judge shall add such note or statement as will inform the appellate court of such matters connected with the case as may be material to a clear understanding of the error complained of.

4. The "special assignment" referred to as necessary to give the court jurisdiction has been fully defined by the courts. To comply with the requirement, the ground of error must be "distinctly set forth." It must not only specify the decision complained of, but "must point out the error in such decision," and "must point out the reason why the decision is error." It must allege error so distinctly, that "a reviewing court may understand the ground of error relied on."

5. Where, as in the instant case, matters both of law and fact are passed on by the trial judge, the assignment must indicate whether the error is alleged to be in the findings of facts, or in the law applicable thereto, and this is true even though it may be "gathered" from the bill of exceptions that the error assigned relates to the law rather than the facts.

6. These rules are deemed necessary in fairness to the trial judge who would otherwise be in danger of being "ambushed;" to the adversary counsel "in order that he may know" what he is to meet; and to the reviewing court in order that it need not "wander through" the record, "in search for questions to determine or error to reverse."

7. These rules do not conflict with another rule under which one general assignment as to overruling a motion or a demurrer is sufficient to reach every ground therein set out.

In this connection it is proper to add that since the establishment of our judiciary in 1799, the fundamental principle in all pleading has been simplicity and clearness, embodied in the brief requirement, (*Code* 5538) that the plaintiff shall "plainly, fully, and distinctly" set forth his grievance, and the defendant shall "plainly, fully and distinctly", (*Code* 5635,) set forth his defense; to which it is added, (*Code* 5636,) that a general denial warrants no other defense than such as disproves the plaintiff's allegations, and that "all other matters in confession or avoidance must be specially pleaded."

The case of *Johnson vs. Ballingall*, 1 Ga., 68, interpreting these rules, remains to this day the unchallenged law, including the dictum therein that

> "All matters in confession and avoidance, whether going to the original making of the contract, or to its subsequent discharge, must now be specially pleaded."

Under these principles it must be clear that not only

was there no assignment of error in the Georgia Supreme Court, sufficient to warrant it in passing on the matters referred to, but there could have been none, because there was no such issue made in the pleadings before the trial court.

And these principles will explain what the Supreme Court of Georgia meant when it said in the decision and opinion now considered,

> "Regardless of whether the assignments of error in the bill of exceptions raise the question of the expiration of the charter of the Collins Park & Belt Railroad Company, so that it can be considered by this Court, it is clear, etc."

The principles here set out and the more elaborate treatment of the subject of the assignment of error beginning in the appendix on page 74 *infra*, will be referred to when we come to discuss the questions to which they are applicable.

If our views are correct, the questions discussed in the petitioner's brief not only were not passed on by the Supreme Court of Georgia, but could not have been. Clearly, therefore, it would be most inappropriate to say that that court erred, in not considering these matters, when it was forbidden by law to do so. It would not only destroy the law of Georgia which forbids them to decide errors not assigned, but it would have been contrary to all the principles of jurisprudence to consider issues that were not before the trial court.

II. The City's Relation to the Franchise

Another preliminary matter that it may be well at

this point to make clear, relates to the question of who grants the franchise for a street railway in Georgia. Apparently, in a number of the states the franchise is granted by a city. Possibly it may not be a matter of great importance, but it will avoid confusion to say that such is not the case in Georgia. And this is true, although it is frequently spoken of otherwise, and although, in the pleadings in this case, even counsel for the city so referred to it.

In the decision now considered the Supreme Court of Georgia said,

> "Under the constitution all that towns and cities have to give to the construction of passenger street railways within the limits of the same is the consent of the corporate authorities."

It is elementary that the highways of a state, including city streets, are the property of the state. They may be built, some by the counties and some by municipalities, as indeed they are in Georgia, and the state may grant and does grant, either to county or city, extensive authority over them, but, after all, they belong to the state, and the state may do as it pleases with them, at least so far as concerns the rights of city or county.

Judicial authority on this subject in Georgia is abundant, but it will perhaps be sufficient to cite the case of *The Savannah etc. Railroad Co. vs. Savannah*, 45 Ga., 602, where it was said,

> "The State has the same right of eminent domain over the streets and squares of Savannah, dedicated to the use of the inhabitants of the

city, by Act of 1760, and those since laid out upon the common, dedicated by that Act to the same use, as it has over other territory of the State, and may lay an additional servitude upon such streets and squares, by granting to a corporation the right to run a street railway, whose cars are drawn by animal power, through them, without the consent of the Mayor and Aldermen of the city."

And the case of *Floyd County vs. The Railroad*, 77 Ga., 619, where the court quoted and adopted this dictum from Pierce on Railroads:

"The legislature, unless restricted by the State constitution, may, even without the consent of a municipality, and without allowing it compensation, authorize railroads to be laid in its highways. If the city or town is deemed the owner of the fee, it holds the interest as trustee of the public, without the title to compensation as proprietor. The statute, however, may require the consent of the municipality."

The case above cited from the 45th Georgia, was decided in 1872. In 1877 a consitutional convention was held and the constitution by it adopted imposed numerous limitations on the legislative authority, one of which, adopted no doubt because of the rule in the 45th Georgia case, and now shown in Code Section 6448, was as follows:

"The General Assembly shall not authorize the construction of any street passenger-railway within the limits of any incorporated town or city, without the consent of the corporate authorities."

The just provisions of this law, thus made compulsory on the legislature, was voluntarily extended

by that body in the general incorporation law of 1892, referred to on page 2 *supra*, for like protection to the counties. (See Code 2585, sub-section 5.)

Further than thus, by its consent, to make the state's corporate franchises to be and to do, effective, it will be apparent that a town or city has no power or authority in the premises at all. In giving such consent municipalities frequently use language appropriate to grants, and in legal pleadings and even in judicial utterances the same inaccuracy often occurs, but the brief and simple history of the matter above set out demonstrates that the corporate existence and privileges emanate solely from the state, and that the city has nothing to do with the matter except to consent to a user of the highway that has been already authorised by the state. It follows that, when these privileges are surrendered, they must be surrendered, not to the city, but rather to the sovereign who granted them.

And we submit here that the limitation contained in 6448 merely operated to give to municipalities the same power and protection that is otherwise secured by the Constitution to private persons, and to put the city on the same footing, *pro tanto*, as to its streets, that an individual has as to his private land. Thus if the state incorporates a trolley company and empowers it to build a line along a route that crosses my land, the company can not exercise its franchise except by my consent, (unless, of course, it secures and exercises the power to condemn.) Before 1877 the city had no such protection. By Code Section 6448 it has. But if the city gives its consent to the laying of the track, it does not grant a corporate franchise, any more than a land owner does who gives like consent.

These matters will be further referred to when we come to consider the claim, advanced in argument but never in the pleadings, that the franchise for this line terminated in 1919. It will also be further discussed in considering the question of the surrender of the franchise and whom the surrender should be to.

THIRD PART—THE COMPANY'S CONTENTIONS CONSIDERED

I. That the Company can Cease to Operate When Losing Money.

II. Question of the Duration of the Contract

1. Whether Perpetual or Not.

2. As Affected by the Collins Park Charter.

CONSIDERATION OF THE COMPANY'S CONTENTIONS

I. The Doctrine that the Usual Permissive Charter of a Railroad Does not Give Rise to Any Obligation on the Part of the Company to Operate its Road at a loss.

This principle, as relied on by the petitioner, is not relevant. We are not counting on any implied obligation arising from the company's charter, but on its express contract of March 3d, 1903. And this is all that is necessary to be said.

But lest we be wrong in this, we submit the following views on the doctrine stated:

Until the *Brooks-Scanlon* case was decided in 1920 it is probable that many, if not most of the bar, had appraised the rule of the Dartmouth College case as meaning that the contract in a charter bound the corporation to perform at all hazards. The doctrine now under consideration, and which somewhat qualifies the supposed meaning of the Dartmouth College case, seems to have first been clearly formulated in *Brooks-Scanlon vs. The Railroad Commission*, 251 U. S., 396, and made a little more definite in *Bullock vs. Florida Railroad Commission* in 254 U. S., 513, and again in *Railroad Commission of Texas vs. E. Texas R. R. Co.*, 264 U. S., 79, and was followed and adopted as the law of Georgia in *Coffee vs. Gray*, 158 Ga., 218, decided in 1924, and in *Morris vs. Atlanta Northern Rwy. Co.*, 160 Ga., 775.

Clearly the doctrine does not mean that the grant and acceptance of a charter involves no contract at all on the part of the corporation, for in *Missouri Pacific*

R. R. Co. vs. Kansas, 216 U. S., 262, this court said,

> "But where a duty which a corporation is obliged to render is a necessary consequence of the acceptance and continued enjoyment of its corporate rights, those rights not having been surrendered by the corporation, other considerations are, in the nature of things, paramount, since it cannot be said that an order compelling the performance of such a duty at a pecuniary loss is unreasonable. *To conclude to the contrary would be but to declare that a corporate charter was purely unilateral*; that is, was binding in favor of the corporation as to all rights conferred upon it, and was devoid of obligation as to duties imposed, even although such duties were the absolute correlative of the rights conferred."

It is equally clear that the doctrine in question has nothing to do with the case of an express contract, but relates only to the contractual duty supposed to arise from the charter. In the *Bullock* case cited it was said,

> "*Apart from statute or express contract* people who have put their money into a railroad are not bound to go on with it at a loss if there is no reasonable prospect of profitable operation in the future."

This case does not negative what was said in the *Missouri Pacific* case quoted, but restricts the extent of the implied contract in this language,

> "No implied contract that they will do so can be elicited from the mere fact that they have accepted a charter from the state, and have been allowed to exercise the power of eminent domain."

But it seems that the homely maxim applies that

the corporation "can not eat its pie and have it too." In the *Brooks-Scanlon* case this court said:

> "It is true that if a railroad continues to exercise the power conferred upon it by a charter from a state, the state may require it to fulfil an obligation imposed by the charter, even though fulfilment in that particular may cause a loss."

and it seems clear that the obligation here referred to means performance of the duty contemplated by its charter, and that it must so perform as long as it retains and enjoys its corporate privileges. Practically the same language as is above quoted is used in the *Missouri Pacific* case, and a like doctrine is stated in *Erie R. R. Co. vs. Board of Public Utility Commissioners*, 254 U. S., 394.

That this means that the corporation desiring to stop loss by ceasing to operate must stop entirely, seems to be very clearly indicated in *Fort Smith Light & Traction Co. vs. Bourland*, 267 U. S., 330.

Atlanta Northern Railway is a corporation, all the stock of which, it appears from this record belongs to the petitioner, but it is nominally a separate corporation. In 1924 petitioner, or the Atlanta Northern, adopted a policy exactly similar to what is attempted in the present case. In the case of *Morris vs. Atlanta Northern* already cited, the Supreme Court of Georgia, following the cases above cited, sustained its right of the corporation, if losing money, to quit, but said in a case where there was no special contract,

> "If the defendant company had discontinued the operation of a part of its line and dismantled the same or was threatening so to do a different

question would arise, and the rulings made in the case of Ft. Smith Light & Traction Co. vs. Bourland, supra, and the case of Macon Railway vs. Corbin, supra, would be applicable."

The case of *Macon Railway & Light Co. vs. Corbin*, 155 Ga., 197, differs from the Morris case in this, that there was there, as here, an express contract, so that the ruling was not based on mere charter implication; but it is, for that reason, *argumentum a fortiori*, though more exactly pertinent to the City's own case as set forth on page 20 *supra*; but it is worth noting the principle expressed in the case in this language:

"Under the above contract, the street railway company cannot retain and enjoy the right granted to it under the resolution without complying with all of its obligations in such contract, and can not abandon a portion of its line of railway, while retaining and operating another portion under the grant from the county commissioners. So long as the company retains any of the benefits it must perform all the obligations imposed by the contract."

Upon considering the foregoing it will be apparent that so much of petitioner's answer as begins on page 80 of the printed transcript and embraces paragraphs 10 to 16 inclusive was an effort to anticipate what was said in the Fort Smith case and in the two cases cited from 155 and 160 Georgia.

In the case of *St. Louis & San Francisco Rwy. Co. vs. Gill*, 156 U. S., 649, the rule had been very clearly stated that in estimating earnings and expenses in order to determine the reasonableness or unreasonableness of a rate or requirement of law, regard must be had to the whole road and not to a part, and in *Puget Sound*

Traction Light & Power Co. vs. Reynolds, 244 U. S., 574, this court had quoted from *Gill's* case and reaffirmed the following language,

> "That the correct test was as to the effect of the act on the defendants entire line, and not upon that part which was formerly a part of one of the consolidating roads; that the company cannot claim the right to earn a net profit from every mile, section, or other part into which the road might be divided, nor attack as unjust a regulation which fixed a rate at which some such part would be unremunerative; * * * and, finally, that to the extent that the question of injustice is to be determined by the effects of the act upon the earnings of the company, the earnings of the entire line must be estimated as against all its legitimate expenses."

In the present case petitioner seems to rely on what it conceives to be a contrary view expressed in *Northern Pacific vs. North Dakota*, 236 U. S., 585; but exactly the same situation arose in the *Puget Sound* case and this court, referring to the *Northern Pacific* case, said there:

> "In our opinion, that decision is inapplicable, the present case being controlled rather by St. Louis & S. F. R. Co. vs. Gill, 156 U. S. 649."

Arguments of Petitioner that the Line in Controversy is not Part of a System.

The expressions of the Georgia court in the cases cited from 158 and 160 Georgia and of this court in the *Fort Smith* case in 267 U. S. so far limit the rule laid down in the *Brooks-Scanlon* case and others as apparently to give petitioner some concern.

Unable to deny that it is earning substantial profits on the "system" it was chartered to operate, and of course unwilling to give up this lucrative "system," petitioner falls back, in its original answer in paragraphs 10 to 14 inclusive, on this unique argument:

> "By the act of 1907, incorporated in Code Section 2662, the power granted in that act to the Public Service Commission to regulate fares made an exception as to those cases in which there were or might be contracts on the subject of fares, and forbade the Commission to impair such contracts. Therefore, as the Commission is forbidden to impair this contract, the legislature has taken this road out of the system and left the defendant companies free to impair it themselves."

That is a perfectly fair and accurate translation of the contention made. I can not answer it. My mind, I think, is logical, and I just don't know how to seriously argue such a proposition. I can only state its legal equivalent thus:

> "A contracts to build me a house and gives me a bond to comply with his obligation. Damage having arisen, I sue him on the bond. He answers that he has elected to set aside the contract and argues thus: 'The Constitution of the United States forbids any state to impair the obligation of a contract. Therefore the State of Georgia can not by law repeal my contract and relieve me of my bond, and it has forbidden its courts or its commission to do so. It follows that I have a clear legal right to set it aside myself.' "

That is a perfectly parallel argument. If it does not answer itself, I can't answer it. Perhaps, however, it is pertinent to repeat here what we said on page 11

supra, that the Act of 1907 left this and all other lines having contracts, subject to the commission in all respects except that it prohibited impairment of the contract.

For a like reason, and with the additional purpose to show that its contract was legally applicable only to a part even of this line, in paragraph 15 of the original answer petitioner, (*p. 85,*) put up two other arguments.

First, it argues that there were several entirely separate lines, constructed under what it is pleased to call "franchises" from Atlanta, Edgewood, Kirkwood, DeKalb County and Decatur. But the record shows that it was one line and was always so treated, and, even if they were separate lines, this court has indicated in the *Puget Sound* case, already cited from 244 U. S., that that fact is wholly immaterial, saying:

> "Plaintiff's brief contains some general attacks upon the effect of the Commission's order in requiring plaintiff to carry passengers over portions of 'separate and distinct franchise routes' upon payment of a single fare. This criticism is not well founded. Even were the several portions of its lines separately owned, they being operated practically as a single system, it would be within the bounds of reasonable regulation to establish through service and a joint rate."

Moreover, petitioner itself has expressly negatived any such contention in the very language of the contract. On page 20 *supra* we quote language from the contract as shown on page 16 of the transcript, expressly defining the line affected as extending "from the terminus in Atlanta to the terminus in Decatur."

Similar language is shown in the same contract on page 15 of the transcript.

Second, it argues again, in the same paragraph of the answer, that it could not offer to surrender to Decatur but half the "franchise" even inside the city, because the other half of it was based on a franchise granted by DeKalb County through territory afterwards incorporated in the town. Again they are in error. Such jurisdiction as the county had over the rural territory passed to the town when the territory was incorporated. In *Almand vs. The Atlanta Consolidated Street Railway Co.*, 108 Ga., 417, the Georgia Court ruled on a situation almost identical, and said at page 427.

> "The moment that the legislature created the municipal corporation and gave it jurisdiction and control over its streets and fixed the limits of the corporation so as to embrace therein as one of its streets a part of what was formerly a county highway, the jurisdiction of the county over this part of the highway ceased, and the same became subject to the control and jurisdiction of the municipal authorities."

All this is, of course, irrelevant. The City does not grant any franchise at all. As we have attempted to make clear in this brief in pages 35 to 39 *supra*, the City's connection with the franchise is exactly that of a private landowner, no more and no less. And this truth is recognized in the decision under review in language quoted on page 36 *supra*.

The more we examine this contention of the company that the line in question is no part of the "system, the more remarkable it appears. For note the situation

and attitude of the parties before this suggestion crept into the record.

The lessor company was chartered in 1902 for the express purpose of making the line part of a "railroad" to be 140 miles long, and part of a "complete system." The very contract in question is reconcilable with no other theory. The charter of the lessee company in 1911, after the act of 1907 was passed, stipulated that it was to be part of a "system" some two hundred miles long. The twenty million dollar mortgage covered the "system." The lease of 1912 not only so treated it, but expressly stipulated that the lessee should adhere to the contract. The history given in the agreed statement of fact is reconcilable with no other theory. The Green affidavit (*transcript page 53,*) shows that it was notoriously operated as a system. The very pleadings of the defendant show it, notwithstanding the argumentative denial in paragraphs 10 to 16.

Even after the last named issue was attempted, the Butler affidavit itself is reconcilable with no other theory.

So of the effort to argue that the road was dependent on the so called "franchise" of 1899 to the Collins Park Company. Aside from the legal facts which demonstrate as already pointed out, that that consent became *functus officio* when the Electric Company, in 1902, by express statutory authority, bought out the property and consolidated it with its system, the fact stares us in the face that in the very correspondence which constituted the present effort of the company to violate its contract, the company itself stated that after the purchase of the line, the City, in 1903, "amended"

said "permit or franchise" and granted it an additional permit, (*transcript page 43*).

II. Question of the Duration of the Contract.

1. As Affected by its Alleged Perpetuality

The petition for certiorari begins with the following inaccurate statement:

> "The City of Decatur * * * * * brought an equitable petition * * * * to enjoin the street railway companies from ceasing to operate its (their) lines * * * * within the limits of the Town of Decatur, and to perpetually compel operation thereof at a five cents rate of fare," etc.

The record shows, (*transcript page 76,*) that there was no prayer for perpetual operation, but merely for an injunction against a present violation of a contract. The statement challenged seems, therefore, to represent an argument in the minds of counsel rather than an accurate reading of the City's petition.

While we think the contract did contemplate perpetual operation, or, at least, duration as long as the corporate life of the contracting company, that question is not now involved.

The constant iteration in the petition and brief alike of the formula, "perpetual, never ending," etc., would, by its needless frequency, impress the mind as verging on the ludicrous, if it were not manifestly intended as an appeal for sympathy, but the question it seeks to raise is wholly academic. The contract having been but recently adjudged to be "valid and subsisting," and one of the parties threatening to

violate it, a petition against a present breach hardly involves the question of its future duration.

Discussion of the Academic Question.

While we ourselves think, therefore, that the question is not in the case, we reply to the argument.

No such question as any alleged perpetuality or indefiniteness in the contract was made by the pleadings in the trial court, and there was no specific assignment of error on the subject in the Georgia Supreme Court. Indeed this thought was never heard of until the petition and supporting brief were filed in the certiorari case. Nor can we deduce now from petitioner's present brief, just exactly what the point is that it seeks to make; that is to say, whether they are asking this court to hold that the contract is ambiguous or indefinite in duration; or that it is not perpetual; or that it is perpetual and therefore void as against public policy.

If the terms of a contract are ambiguous as to its duration, it would no doubt be competent for a trial court, upon proper pleadings, to construe it as limited to some special time otherwise deducible from the pleadings or evidence. It might possibly, in such a case, be, that a court could properly give the benefit of a doubt against the perpetual theory. That we think was the *ratio decidendi* in the *Texas Pacific* case cited by petitioner from 136 U. S. from which we quote as follows:

> "Such a contract, while we do not say that it would be void on the ground of public policy, is undoubtedly so far objectionable as obstructing

improvements and changes which might be for the public interest, and is so far a hindrance in the way of what might be necessary for the advantage of the railroad itself and of the community which enjoyed its benefits, that we must look the whole contract over critically before we decide that it bears such an imperative and such a remarkable meaning."

So again, if it is indefinite as to time, it might, perhaps, be held terminable by either party on reasonable notice and equitable terms, but here again it would be needful that there be some sort of pleadings to justify a court in acting, and there ought to be some assignment of error invoking a review of that question, before an appellate court could be said to have committed error itself in failing to pass on the question.

It is conceivable that a contract might be in terms perpetual, but so based on some element of personal confidence as to make its provisions repugnant. In such a case, a trial court might on proper pleadings impose an equitable limit on its duration.

There may be many other such possibilities, but all dependent upon proper pleadings and assignments. We know of no precedent or legal principle for what the petitioner is vaguely seeking here. Indeed we question whether counsel for petitioner can even now accurately define their own position.

On page 21 of petitioner's brief, it is said that

> "This court has repeatedly held that municipal rate contracts do not compel perpetual and never ending operation."

We question the accuracy of this statement, which seems to us a little extravagant. The *Texas Pacific* case, which petitioner principally relies on to justify the statement, merely interpreted the contract and held that "permanent" is not synonymous with "perpetual." In view of that fact, we submit that so much of that case as discusses the remedy of specific performance, and holds that redress should be sought at law, is *obiter*. Indeed, the expression of the court on that subject was hypothetical only.

The well known doctrine of chancery that its extraordinary remedies are discretionary, hardly touches the question of substantive right. In the *Texas Pacific* case this court was reviewing a lower court of the Federal system, and could very properly hold that, as a matter of discretion, the parties should be left by chancery to the remedies at law. We would doubt whether a similar review of a state court would be competent. In remedies, it is the *lex fori* that should be considered. Where a state court gives effect to substantive rights, remedies are for it to administer.

We can see no federal question in any view of this attempted issue. We know of no principle upon which any court, state or federal, can hold that a contract is invalid because made for too long a period.

The subject was considered in *Franklin Telegraph Co., vs. Harrison*, 145 U. S., 459, and that case was so similar to the present, in so many respects, that it seems to us the only authority needed in this case. The case of *Western Union Co. vs. The Pennsylvania* Co., 129 Fed. Repl, 849, is also quite similar; and because of its exhaustive examination of all the precedents, is an invaluable document. On page 25 *supra*

we have already quoted freely from the *Harrison* case on the general merits, but it also discusses the subject of duration, as well as of remedies at law and in equity. We rely strongly on it.

As already stated, it is not clear whether petitioner claims the contract to be for a time less than perpetual, or to be void as against public policy, because it *is* perpetual. If the latter theory is the one intended, we submit that public policy is a matter for each state to determine for itself. The common law doctrine against perpetuity in landed property is probably of force in all the states, but if it were abolished by law in Georgia or held inapplicable by the Georgia Court in a given case, we think it would not raise a federal question. The same would be true in respect of the well known doctrine that totally avoids a contract, unlimited in time or place, to abstain from a particular business. Under normal conditions these would hardly give rise to any federal question.

But petitioner seems to think that the duration of the contract raises some vague federal question because of the allegation tnat the contract rates are less than the cost of service. The contention is so manifestly irrelevant, that we feel compelled to apologize to the court for answering it. Whenever it is properly raised as a legal issue, we will meet it by legal evidence and pertinent argument, not passively but aggressively, not as oppressor but as victim. Meanwhile this court has already, in 262 U. S., declared the question irrelevant here. In the face of that definite ruling, we have not even felt it necessary to call attention to the utterly perfunctory character of the Butler affidavit, and the absurdity of its conclusions. In view of their total disregard of the spirit of the

ruling in *Dow vs. Beidleman*, 125 U. S., 680, and its complete suppression of any and all information as to how the conclusions of the witness were reached, not to speak of the hearsay character of the Beeler Report interjection, we assume that no court would attach the slightest importance to that testimony, even if it were relevant. Because of its complete irrelevance we did not even complain in the appellate court of its admission, and it is evident that neither the trial court nor the appellate court attached any importance to it.

But, recurring to the theory of petitioner that the contract is void as against public policy, and assuming that to be a federal question, petitioner overlooks the fact that if that were true, it would be void *ab initio*. But how can that be when the state courts and this court have all held that it was not void *ab initio*, but was "valid and subsisting for at least twenty-two years after it was made.

Between the dilemma of claiming that the contract is not perpetual, or that it is void because it is perpetual, petitioner has suggested the existence of a little intermediate horn on which to hang a hope. In clause *d* of paragraph 6 of the petition, it invokes a ruling to the effect that a municipal corporation can not make a contract "grossly unreasonable in point of time," and says in terms that it is "entitled to have this court so determine." (*See page 9 of printed petition.*) If that were a federal question, it is not possible to see how it could be availed of here as a matter of original jurisdiction, nor anywhere else without appropriate pleadings and some suggestion on which issue could be joined, as to what period of time is or is not "grossly unreasonable."

It is not possible to find in the entire record, anywhere, until the petition for certiorari was filed, any pleading that would give the City of Decatur notice of such a hope held by the company or any opportunity to offer evidence or be heard on the subject. And yet, as all such public utility concerns do, they talk incessantly about "due process of law", apparently never conceiving that the City of Decatur is just as much entitled as they are to the shelter of that aegis.

What petitioner is seeking here, is not the correction of any error anywhere along the line up which this case has painfully travelled; but, in their own literal words, "to have this court determine" that their contract, freely, deliberately, and at their own request, entered into with the city, shall be made over for them by this appellate court, and without even hinting at what its duration should be, or in what other respect it should be reformed.

2. As Affected by Termination of the Collins Park Charter

In addition to its undefined complaint about the "perpetual and never ending" obligation of its contract, petitioner is setting up a claim to the effect that, because the line in question was ostensibly built by the Collins Park Company, and because the corporate existence of that company ended in 1919, the obligation of this contract with a different company should be construed as ending at the same time. To this obviously illogical proposition there are several replies.

First, it is not established that the Collins Park Charter terminated in 1919. Certainly, under normal conditions, that would be the presumption of law. But

when no such defense was set up in the pleadings, it may well be doubted whether such a presumption would exist. For Code Section 5635 requires the defense to be "plainly, fully and distinctly" set forth; Section 5636 is even more explicit and requires all matters in satisfaction or avoidance to be specially pleaded; and the case of *Johnson vs. Ballingall* in 1st Georgia, quoted on page 34 *supra* excludes consideration of any such defense in the trial court, as to the discharge of a contract, unless so pleaded. It is clear therefore that the city had no notice of any such claimed ground of discharge, and would have been out of order to have offered evidence to show that the *de jure* corporate life had been extended, as was expressly authorised by law. We assume therefore, as the question was not made either in the pleadings or in the assignments, that this court will not now entertain such a presumption.

Second, If it be held otherwise and that the corporation did cease to exist *de jure* in 1919, the failure to raise such question in the pleadings or otherwise in the trial court, and the failure to make any such assignment of error in the Supreme Court of Georgia would preclude consideration of it here. There is nothing here in the way of any record or certificate that any such question was ever made in the State Supreme Court, and the language of the opinion, as shown on page 102 of the transcript, clearly indicates that it was not made.

Third, There is absolutely no reason why the Collins Park Charter is to be considered in the matter at all. In 1902 it had sold out all its phycical properties to the Georgia Railway & Electric Company. There was express legislative authority for such a company,

incorporated under the general law of 1892, to buy such old lines and consolidate them with its system; the Georgia Railway & Electric Company had been legally incorporated for 101 years for the express purpose of buying this very line and making it part of the "system" it was proposing to create; and it had so bought and consolidated.

After that, the Collins Park Company faded out of the picture. The contract was not made with it, but with the Georgia Railway & Electric Company, predecessor of and identical with the present Georgia Power Company. Manifestly the Collins Park Co. was not in the contemplation of the parties when the contract was made. Neither was it in the eye of the law. After it had nominally built this line and conveyed it to petitioner, it was *functus officio*. It may not have been dead *de jure*, but it was dead *de facto* when this contract was made. Possibly the manner of its taking off was not according to the statutes for such cases made and provided. Mayhap its dying at corporate headquarters was irregular, but we know of no principle in legal pathology that makes death void for irregularity.

Fourth. It is argued that, even if the contract was not made in contemplation of the Collins Park Charter, the "franchise" was granted by the City in such contemplation, and therefore the subsequent contract must be so construed because any other view would extend its franchise in the streets to the hurt of the City. The argument is fatally vulnerable. For not only did the state authorise the transfer of the corporate assets of the Collins Park Company to the Georgia Railway & Electric Company, and extend its rights for 101 years, but the city itself, by express

covenant, gave consent thereto, and even enlarged its consent to a double tracking, (*see transcript page 16, "Fourth".*) If this was not a mutual and express abandonment of all consideration of the Collins Park consent, (inaccurately styled a franchise,) by both parties, it would have been a complete estoppel against the city. What says the Supreme Court of Georgia on the subject?

> "Regardless of whether the assignments of error in the bill of exceptions raise the question of the expiration of the charter of the Collins Park and Belt Railroad Company, so that it can be considered by this court, it is clear that the City of Decatur, under said contract, could not deny that it had given its consent to the construction of this street-railway system upon its streets."

Indeed it may well be doubted whether the consent of the city was necessary under the constitutional requirement of Code Section 6448. What that requires is the consent of the city to the "construction, not to the subsequent maintenance or continued use, and, of course, the limitation on the legislative authority thus imposed will be strictly construed. It was said in *Floyd County vs. Rome St. Rwy. Co.*, 77 Ga., 619, that the consent once given is "irrevocable."

When the City gives its consent to the "construction" of a street car line under the right thus reserved to it by 6448, the condition is complied with. The power of the city is at an end. Whether the constructing company continues to operate the line or sells it out to another company is no concern of the city. The "construction" had taken place. ***And this plaintiff in error would be the last to question that fact.***

That these views, including the company's own attitude on the question, are indisputable, appears in many ways, and in no way more conclusively than in the fact that the new company bought the line from Collins Park without any consent from the City, and was operating it under authority of its charter from the state without receiving or asking the city's consent, and without any question made by the city, until the contemplated double tracking made a supplemental consent necessary, a consent which the company itself refers to as an "additional permit," in its letter of Sept. 26, 1925, shown on transcript page 43.

Fifth, From that time until 1925, as alleged in paragraph 17 of the suit, (*transcript p. 70*), both parties lived up to and acted on this theory, (except when the company attempted in 1920 to violate the contract,) and both treated the duration of the contract as continuing as long at least as the corporate life of the new company. No suggestion to the contrary was ever heard until the decree that is now under review was entered Sept. 15, 1928, (*transcript page 96*).

And these facts naturally bring up the matter of the previous adjudication and its effect, as specially pleaded by the city. (*See transcript page 74 par. 29*).

The Question of Res Judicata

That the former cases, already abundantly before this court, conclude all the questions in this case, and especially the matter of the Collins Park charter, is manifest. For, if the contract of 1903 terminated in 1919, as now for the first time set up, it had terminated and that fact was available for defense, when the former litigation began. As already stated, (see page 13

supra,) that litigation grew out of the company's notice on October 5th, 1920. It has, therefore, been adjudicated that the contract did not terminate on August 16, 1919.

Of course it would be futile for the petitioner to say now that the issue was not made in the former litigation. For, if it was not made it could have been, and it is not only established by the Georgia decisions of *Hollinshead vs. Woodward* 128 Ga., 7, and *Watkins vs. Lawton*, 69 Ga., 671, that this is the same thing, but by numerous cases in this court, of which it is sufficient to refer to *N. Y. Life Ins. Co. vs. Bangs*, 103 U.S., 780, from which we quote as follows:

> "When an action at law is brought upon a contract, the defendant who denies its obligation, either from fraud, payment or release, or any other matter affecting its original validity or subsequent discharge, must present his defense for consideration."

On page 7 of petitioner's brief it is mentioned as a fact that the former record "was not introduced in evidence." Whether the trial court, the Supreme Court of Georgia, and this court are therefore precluded from taking notice of their own records is not a question we feel invited to discuss. Possibly there may be some such bare technical piece of legalism. We do not know. But the facts of that litigation are all within the actual knowledge of the court and constantly referred to in petitioner's brief, and we hardly suppose that, in a review upon certiorari, this court will remand a case when but one result can follow. If judicial precedent for such a view is needed, we submit that the spirit of the last paragraph of the opinion in the *Brooks-Scanlon* case is ample.

FOURTH PART—THE PETITIONER'S CONCEPTION OF EQUITY

Candid analysis of the petitioner's attitude may be thus nakedly stated:

> "The contract was made at our instance and at our urgent request. It was binding on Decatur from the beginning; but, being grossly unreasonable in point of time, was never binding on us. While it was void as an obligation on us, *ab initio*, and therefore never binding on us, it ceased to be binding on us in 1919 by operation of law. It ceased again to be binding on us in 1925, when we offered to cease being bound by it.
>
> "But, although it never was binding on us, and has twice ceased to be binding on us, we now desire to be relieved of the operation of this part of the system we were chartered to operate, and which we contracted to operate; and therefore, in a large and liberal spirit of equity, we offer to quit being bound to operate it.
>
> "Since the Georgia courts have forbidden us to violate the contract, we now submit that we are 'entitled to have this court determine,' (*see printed petition, page 9, subparagraph d,*) that the town had no legal authority to make such an unreasonable contract, notwithstanding the decision of the Georgia court in the 149th Georgia that it did have that authority; and further to determine that, therefore, the Supreme Court of Georgia erred in failing to consider a question of mere state law that was not before it; and in failing to reverse the trial court for not considering a question that was not before it; and in failing to reform and reshape a contract when there was no prayer before the court for such reformation, and no pleading looking to such course.
>
> "So far as concerns the suggestion that all the questions in this case have already been adjudicated, and so far as concerns the fact that this court

has already decided that the controversy contains no question growing out of the 14th amendment, we are unable to make any answer at all, and we therefore keep silent on these matters; but we are dissatisfied with our bargain, and still insist that, through our own contract, we are deprived of our property by the State of Georgia without due process of law.

"And, in support of this contention, we can and do prove by Mr. Butler, that an unnamed auditor once told the public Service Commission of Georgia certain ultimate facts, and that one John A. Beeler of New York once told the City of Atlanta certain other ultimate facts, and that Mr. Butler deduces from these assertions a conclusion that the company is losing money on this line, although he admits in the same breath, that it is earning a substantial profit on the 'system'. In view of all this, we feel that we should be relieved of our bargain."

This is a perfectly fair statement of the Company's position as deducible from the record and its brief. It is here expressed more nakedly than they express it; perhaps, we might say, more baldly, but that is, in its substance, exactly what they say; and it is a fair presentation of their conception, not only as to what is law, but of what is equitable and moral.

There is, however, yet another phase to the equity of this case. It is elementary that, where one desires his bargain set aside by a court, there should be a restoration of the *status quo ante*. Petitioner is here admitting, in substance and effect, that, before it can be permitted to abandon a duty growing out of its franchises, it must surrender something. This is a crude and narrow application of that broader principle of equity which demands, in any case, that there be

restitution before cancellation. To apply that principle merely to a franchise obligation, is the narrowing of a large doctrine. In any kind of case there must be restoration, and it is always true that there can be no absolution unless restitution can be and is.

The people of Decatur had a car line. This record does not inform us how they got it. They may have built it out of their own narrow means and given it away, or they may have given inducements to others to build it, or they may have gotten it in any one of a number of possible ways. But it was there, and they had built their homes and adjusted their affairs on the strength of it. Somehow, this company or the predecessors out of which it was evolved, got possession of that line and proceeded to tear it up, to the injury of the people as they claimed, and without due process of law.

Litigation followed, and the record shows that this company was urgent in begging for permission to kill the little ewe lamb, and profuse in promises and offers. The town that hesitates is lost, and Decatur yielded; the compact was carefully worded; the line was torn up—not into Atlanta, so as to leave a route by which a new line could be constructed—but out of Decatur, so that the people could not get to Atlanta that way.

Now it is proposed to do the same w th this line. If the Decatur end is cut off, not less than 12,000 people are left where they can be coerced into a consent that their contract be cancelled, or be cut off from this access to their daily business, with no practical way shown by which they can reach it, and no route pointed out upon which they can build them another line. It was, no doubt, to this fact that the Supreme Court

of Georgia referred in the second head note, when they said that the law makes a valid contract "effective according to its terms," and added this:

> "And that principle is especially applicable in this case, because, if the contract is set aside or ignored, the situation of the parties anterior to the contract and at the time of making the same can not be restored."

APPENDICES

A—THE MATTER OF THE PAVING CHARGE
B—ASSIGNMENTS OF ERROR IN GEORGIA PRACTICE

APPENDIX A.

MATTER OF THE PAVING CHARGE

As already stated on page 28 *supra*, we do not consider this question before the court, but present the local law about it in an appendix to be considered if the court thinks it necessary, otherwise to be ignored.

The so called "affidavit of illegality" is a branch of our local jurisprudence about which has been collected a large body of judicial decisions. It was originally intended to apply only as a substitute for equitable protection against efforts to enforce normal executions based on judgments, where the judgment had been satisfied, or the execution was, for any other reason proceeding illegally. The original charter of its authority is in Code Section 5305 as follows:

> "When an execution against the property of any person shall issue illegally, or shall be proceeding illegally, and such execution shall be levied on property, such person may make oath in writing, and shall state the cause of such illegality, and deliver the same to the sheriff, or other executing officer, as the case may be, together with bond and good security for the forthcoming of such property, as provided by this Code"

Briefly stated the practice then is that the levying officer shall return the execution and affidavit to the next term of the proper court, where it has a preferred order, the papers so returned constituting the pleadings, the allegations of the "illegality" being taken to be true unless properly traversed. No matter prior to judgment can be heard except want of service. The proceedings are speedy, elastic and economical, the

case being regarded as in the nature of an equity cause.

Quite a large body of jurisprudence has been evolved out of this practice, in the way of authorising *ex parte* judgments and summary executions, with appropriate right to defend by affidavit of illegality. Chattel mortages for instance can be foreclosed and executions issued thereon by *ex parte* affidavit, under Code section 3286, the mortgagor being permitted by Sec. 3289 to file affidavit of illegality setting up any defense he could have interposed in a suit.

By a long train of innumerable statutes, mostly affecting municipal corporations, foreclosure of statutory liens for street paving, sewers, and other local improvements, is so permitted by *ex parte* affidavit, and means of defense afforded on like terms as in the case of chattel mortgages.

In respect of the paving system given to the town of Decatur by the Act of 1919, as alleged in petitioner's answer, defense was so provided in the following language appearing on page 936 of the act:

> "Provided, however, that the defendant railroad company shall have the right to file an affidavit denying that the whole or any part of the amount for which the execution is issued is due, and stating what amount, if any, it admits to be due, which amount so admitted to be due shall be paid before the affidavit shall be received; which affidavit, when received, shall be returned by the marshal of said town to the Superior Court of DeKalb County, and there tried and the issue determined as in the cases of illegality, subject to all the pains and penalties provided in cases of illegality for delay."

With this brief outline and exposition of the Georgia law touching the assessment complained of, and the statutory method of defense, we note the following facts as to the present case:

1. The liability, if it exists, does not differ from any other expense to which the company is exposed by the nature of its business. It stands on the same footing, *quoad* the matter of profit and loss, as taxes, maintenance of way, and other expenses.

2. It is not pleaded as a defense to the city's case, or as any reason why the city's case is not good, but as a cross bill seeking independent relief against an alleged illegal charge, on the ground that the paving law is unconstitutional.

3. It is the only matter at any time presented in this case that raises a federal question. It is the only matter of defense pleaded at all; except the general denial and the irrelevant matters in paragraphs 10 to 16 of the answer, which seek to separate the line from the system in order to escape the *Fort Smith* case. It is the only defense assigned as error in the Supreme Court of Georgia, except the general denial. It is not assigned as error here at all and is not argued in the brief.

4. If the law is unconstitutional as alleged by the company, it is to be presumed that it will not be an expense at all, and therefore can not add to or "aggravate" the company's alleged losses. For this reason it can not have any bearing on the city's case.

It may be gravely questionable whether such an unrelated and independent matter should be allowed

in a case already too much laden with legal questions. But multifariousness is a discretionary matter, upon which no hard and fast rule can or should be enforced, and the matter was not stricken in the trial court. But the principles of law upon which defense is allowed against these improvement charges are well established, and nothing is better settled in Georgia than this, that where statutory and *ex parte* assessments like this are levied, and defense allowed by way of "illegality," no other remedy is available.

The proposition has been so often laid down in Georgia that it would be useless to cite all the cases. The two following are sufficient:

Rice vs. Macon, 117 Ga., 401.
Gainesville vs. Dean, 124 Ga., 750.

Among a host of other cases may be mentioned *Hart u Lazaron*, 46 Ga., 396; *Ansley vs. Glendening*, 56 Ga., 286; *Russell vs. O'Dowd*, 48 Ga., 475; *Hitchcock vs. Culver*, 107 Ga., 184; *Roney vs. McCall*, 128 Ga., 249; *Mathews vs. Gelders*, 129 Ga., 103; *Williams vs. Kennedy*, 134 Ga., 339; *Smith vs. Murphy*, 140 Ga., 80; *Daniels vs. Rosenheim*, 152 Ga., 278.

The above cases apply to illegalities against executions based on judgments. Among similar cases, where the execution was an *ex parte* proceeding for the collection of street improvement assessments, besides the two already specially cited may be mentioned, *Regenstein vs. Atlanta*, 98 Ga., 170; *Lanham vs. Rome*, 136 Ga., 398; *Waycross vs. Cowart*, 164 Ga., 721; *Cotton Mills vs. Social Circle*, 163 Ga., 465.

It is clear, therefore, that the injunction sued for

by the petitioner to enjoin the assessment was not maintainable as a matter of state practice, and that there was a complete remedy at law. No injunction temporary or otherwise having ever been granted, the normal expectation would be that the city has proceeded and that the company has either paid the assessment or filed its affidavit of illegality. If the former happened, the question is now moot. If the latter, then the issue has had its day in court, and either has been ended, or is on its way here by some other road.

To the suggestion in the pleadings that the paving law is unconstitutional, which is the only federal question in this entire case, the complete answer is that the law of Georgia affords an ample method for determination of the question, and that injunction is not that method. In refusing that injunction the Georgia courts have not decided as to the validity of the law, but have merely suggested to petitioner to implead its adversary in the proper way.

APPENDIX B.

ASSIGNMENTS OF ERROR IN GEORGIA PRACTICE

At page 32 of the foregoing brief we stated several principles which we conceive to be established law in Georgia relative to the assignment of error. The following citations and quotations it is believed will be found to fully sustain the statements there made and to constitute a complete demonstration that, as to most of the argument now presented by petitioner, the Supreme Court of Georgia did not consider, and could not legally have considered such matters at all.

By the Constitution of Georgia, (Code Section 6502,) it is provided as follows:

> "The Supreme Court shall have no original jurisdiction but shall be a court alone for the trial and correction of errors of law, etc."

By Code Section 6203 it is provided as follows:

> "The Supreme Court shall not decide any question unless it is made by a special assignment *in the bill of exceptions*, etc."

The appellate practice in Georgia is very simple. The bill of exceptions may or may not include a brief of the evidence, according to circumstances. In the present case it did. But the statute, (Code Section 6139,) contains the following:

> "Such bill of exceptions shall specify plainly, the decision complained of, and the alleged error and shall be signed by the party, his attorney or solicitor."

Code Section 6140 contains the following:

> "If the case is not one in which a judgment on a motion for new trial is to be reviewed, the plaintiff in error shall plainly and specifically set forth the errors alleged to have been committed, and shall incorporate in the bill of exceptions a brief of so much of the written and oral evidence as is material to a clear understanding of the errors complained of, and shall specify therein such portions of the record as are material to such understanding."

Code Section 6145 prescribed the form of certificate

to the bill of exceptions, and Section 6146 is as follows:

"This certificate shall be the writ of error."

By sub section 3 of Code Section 6140 it is provided as follows:

> "The judge to whom such bill of exceptions is tendered shall, if needful, change the same so as to conform to the truth and make it contain all the evidence, and refer to all of the record, necessary to a clear understanding of the errors complained of."

In addition to the extreme simplicity of this system, it will be noted that the assignment of error in Georgia is not *ex parte* as it is in the federal practice, not a mere memorandum of the plaintiff in error, but a part of the official record and must precede the settling of the bill. It not only constitutes notice to adversary counsel and pleading in the appellate court, but informs the judge whose decision is to be reviewed just what the error is, and gives him opportunity under the provision last above quoted, to advise the appellate court of any material fact as to the proceedings before him.

In other words, if, in the trial court, there was nothing about the Collins Park charter, or the perpetual duration matter, even in argument, and no motion or suggestion on these or any other matter complained of, and error was assigned on such a subject, it would be both the right and duty of the trial judge to so certify. It has been held also that, if relevant matters are omitted, the judge may require counsel themselves to make the proper correction. (See *Covin vs. Willis*,

19 Ga. App., 259 and *Brinson vs. Callaway*, 112 Ga., 162.)

Other statutes *in pari materia* are Code Sections 5181 and 5199 relating to practice in certiorari, in the former of which it is provided,

> "In which petition (i. e., for certiorari,) he shall plainly, fully and distinctly set forth the errors complained of."

and in the latter,

> "No ground of error shall be insisted upon, on the hearing which is not distinctly set forth in the petition."

The complete identity in principle of these provisions in certiorari cases with the statutes cited as to the writ of error is obvious. But in *Citizens Bank vs. Paris*, 119 Ga., 517, the Supreme Court said,

> "The certiorari statute provides that the petition shall plainly and distinctly set forth the errors complained of. The requirement of this statute is very similar to that for bills of exceptions, and the principle of the decisions above cited would apply to petitions for certiorari.

So that the decisions as to either of these matters of appellate pleadings, defining what is meant by plainly, fully and distinctly setting forth the error, or by the formula, "shall specify plainly" etc., is applicable to the other. Among such decisions we mention the following:

The Court of Appeals said in *Palmer vs. Ingram*, 2 Ga. App, 200, that

> "An assignment of error must not only plainly specify the decision complained of, *but must point out the error in such decision.*"

and again in *Wall vs. Hawker Poettry Co.*, 27 Ga. App., 255, it was said,

> "Assignment of error must be specific, whether contained in a bill of exceptions or in a petition for certiorari, and, when based on a decision of the trial court, must specifically point out *the reason why the decision is error.*" (Italics mine)

In the case of *Warren vs. Oliver*, cited in the above mentioned authority, from 111 Ga., 808, it was held that an assignment not so complaining could not give the Supreme Court jurisdiction, and that the bill of exceptions would be dismissed.

So in *Clements vs. McCormick*, 115 Ga., 852, the Supreme Court quotes from *Hayden vs. The State*, 69 Ga., 731, this dictum:

> "The plaintiff in certiorari must allege error so distinctly that a reviewing court may understand the ground of error relied on."

In *Kimball vs. Williams & McCurdy*, 108 Ga., 812, where the question at issue was submitted to the judge on law and facts and was decided in favor of the plaintiffs the defendant's assignment of error was, "To which ruling and judgment the said defendant excepted and now assigns the same as error." This language it was said presented no question for determination, and, on this authority, it was said afterwards in *Wheeler vs. Worley*, 110 Ga., 513:

> "Conceding that it may be gathered from the present bill of exceptions that the plaintiff in error seeks to bring under review, not an erroneous finding of fact, but an error of law committed by the trial judge in reaching his conclusion upon a state of facts as to which there was no controversy, it still remains true that such alleged error of law is not plainly and distinctly pointed out."

to which saying it was added:

> "Indeed, it is not pointed out at all, and only by a resort to the brief of counsel filed in behalf of the plaintiff in error can the nature of his complaint in the premises be ascertained, or more than vaguely surmised."

a saying that is singularly applicable to the case now under consideration. For we never heard of such a question nor dreamed of it until we saw the brief in the Supreme Court of Georgia, and the trial judge has never heard of it or passed on it to this day. And we make bold to say that no hint or suggestion of such an issue can be found in the record.

There is, in Georgia, a recognized practice under which, upon review of a motion for new trial or judgments on matters of demurrer, one very general assignment of error will, reach to and adopt each and every of the grounds of the motion or demurrer, but this is exceptional, and it is definitely established that it has no application in a case like the present.

Thus in *Callaway vs. The City of Atlanta*, 6 Ga. App., 354, a penalty had been imposed in excess of a city ordinance and the assignment was that the judgment was contrary to law. The court of appeals held that

this assignment was not sufficiently explicit to warrant consideration because it did not specifically point out any reason why it was contrary to law. Anticipating, however, the distinction referred to above, the court said,

> "It may be necessary to add that we are not speaking of the method of assigning error upon the action of the court in overruling motions for new trial, demurrers, and similar pleadings, in which the specific grounds are definitely set up."

So, in the case of *Mutual B. & L. Assn. vs. Glessner* 99 Ga., 748, it was said:

> "The difference between this case and those where general assignments of error are made upon the overruling of motions for new trials, is obvious. In such cases the grounds of the motion usually point out the errors which the movant claims were committed at the trial. When this is properly done, alleging error in denying the motion brings under review the correctness of the rulings or decisions of which the motion complains. But where a judge trying the case upon the law and the facts disposes of it in a single judgment with which the losing party is dissatisfied, the latter in excepting to it ought certainly to give some intimation of what the error consisted. Simply saying, in effect, that such a judgment was wrong, without stating any ground or reason why it was so, opens a broader field of investigation than our law, which requires all errors to be plainly and distinctly set forth, authorizes. It was never contemplated that this court should search around in a loose and general way to discover errors not brought to its attention with, at least, a reasonable degree of clearness and perspicuity."

The cases of *Patterson v. Beck*, 133 Ga., 701 and *Wood vs. Wood*, 147 Ga., 808, discuss the whole subject fully, and we quote from the last name case this language as furnishing the philosophy of the rule:

> "The decision complained of and the error alleged to exist therein ought to appear plainly. This is fair to the judge whose judgment it is sought to reverse, so that he can make such facts appear, or require such evidence and record to be brought to this court, as may be necessary for a proper consideration of the errors complained of. To allow a mere general assignment which, without more, would not direct the attention of the judge to the real question, and then to hunt for something covered up in such generalities as a ground for reversal, *would be very much like allowing him to be ambushed.* (Italics ours). It is fair to the adverse counsel or party, in order that he may know what he must meet in this court. It is fair to this court, in order that there may be clear-cut questions for them to decide, and not an indefinite complaint for them to wander through in search for questions to determine and errors to reverse."

Applying these principles to the assignment of error in this case, we submit that, while the assignment made was much expanded *in words*, the words used added nothing to the sense of it, and at last it amounted in substance to nothing more than this,

> "That the decree was erroneous and contrary to law and contrary to the evidence in said case and without evidence to support it." (*see transcript p. 61*).

This we say did not point out to the court any specific reason why these things are so, and did not hint at or suggest any such special line of argument as is

now set up in the brief of counsel, touching any alleged expiration of the charter of the Collins Park Company. It "ambushes" the trial court. It failed to put adversary counsel on notice, and required the Georgia court to "wander through" the record, all which things are condemned in the cases cited from the 133d and 147th. And these things are aggravated by the fact that no such question is made in the original pleadings.

Had the pleadings made such an issue, it is conceivable that counsel for the City of Decatur might have had abundant answer to it, as, for instance, that the Collins Park & Belt Railroad had secured some new permit from the city, or that it had amended its charter under the provisions of Code Section 2596, thereby extending its duration. No such issue being made by the pleadings there was no occasion for such answer or replication or any other.

So, if the assignment of error had raised any such issue, the court could, and, no doubt, would have appended his certificate that no such question was made or passed on in the case.

Of course the question may arise as to where the burden lies in showing to this court whether there was such a question. On that subject the Georgia court has said,

> "Where there are several things involved in a judgment, the thing complained of ought to be made to appear."
>
> 133 Ga., 705

a dictum which clearly puts the burden, where it logically belongs, on the plaintiff in error.

Quite a similar ruling is involved in the case of *Higgins v. The Cherokee Railroad*, 73 Ga., 160, where the Georgia court said,

> "The bill of exceptions must plainly specify not only the decision complained of, but 'the error alleged' to exist 'therein,' and without a compliance with this requirement, we cannot consider the points, *which, for aught that appears from the record, are presented for the first time in this court.*"

In *Fidelity & Deposit Co. vs. Anderson*, 102 Ga., 551, attention was called to the fact that, where the court passes on both law and fact, such a general assignment does not inform the appellate court whether he complaint relates to the law or the facts, and in the *Patterson vs. Beck* case already cited the court said,

> "Let us take a few illustrations, that the necessity and propriety of such a rule, duly applied, may be shown. Suppose that a case were submitted to a judge without a jury, in which there were various issues of law and of fact, and that he should render a general judgment in favor of the plaintiff for a sum of money. What question would a mere general exception that this was error present to this court for decision? Would it mean that the judgment on the facts was contrary to the evidence, or without evidence to support it, or that the judgment was for too large a sum? Or that, without complaining of the finding on the facts, there was some error of law? And what error? Thus in *Wade v. Watson*, ante 608, the judge passed on issues both of law and fact, and there was a mere general exception. Even where there was an agreed statement of facts, it has sometimes been held that a mere

> exception to a general judgment by the judge without a jury was insufficient, as the real complaint might be that the judgment was too large or too small, or bore interest, or that the rate of interest used was wrong, or that there should be no recovery at all under the law, or perhaps other matters. Others instances might be added, but these will suffice. Where there are several things involved in a judgment, the thing complained of ought to be made to appear."

And so, in *Hart vs. Phoenix Ins. Co.* in 113 Ga., 862, a case cited and discussed in *Patterson vs. Beck* at page 706, it was said:

> "The bill of exceptions fails signally to show that any such points were made in and passed upon by the trial court. But for the statements in the brief of counsel for the plaintiff in error, *there would be no ground for even surmising that anything of the kind occurred,*"

a statement which fits this case like a glove.